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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 502

SAM FIORELLA,

Petitioner,

vs.

THE CITY OF BIRMINGHAM,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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SUPREME COURT OF THE UNITED STATES

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vs. *Petitioner,*

THE CITY OF BIRMINGHAM,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Sam Fiorella, Respectfully Petitions This Honorable Court for a Writ of Certiorari Directed to the Court of Appeals of the State of Alabama.

Statement of the Matter Involved

The petitioner was arrested, tried and convicted, in the Recorder's Court of the City of Birmingham, Alabama, for the offense of violating the lottery laws of the City of Birmingham as set out in Section 600 of the General City Code of the City of Birmingham, and he appealed from his said conviction to the Circuit Court of Jefferson County, Alabama (R. 1).

Upon the commencement of the trial in the Circuit Court of Jefferson County (Tenth Judicial Circuit), Alabama, the City of Birmingham, through and by its counsel, filed a complaint against the petitioner, charging him with having violated Section 600, of the 1944 General City Code of the City of Birmingham, Alabama (R. 2), which said Section 600 of the 1944 General City Code of said City of Birmingham, is as follows:

> "Any person who possesses any ticket, writing, paper, slip, document, memorandum, list, article, matter or thing of any nature of kind whatsoever, which is customarily or usually used in the operation of a lottery, policy game, or game of chance of any sort or kind, or which is of a kind which is customarily used in the operation of a lottery, policy game, or other game of chance of any sort or kind, shall, upon conviction, be punished in the manner and within the limits specified by section 4. To constitute the offense created by this section it shall not be necessary that the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing be actually used, or actually be in use or is yet actually to be used in the operation of a lottery, policy game or other game of chance. It shall not be a defense to the charge of possessing the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing that it or any of them so possessed have not actually been used or were not then being used, or were not intended to be used in the operation or in connection with the operation of a lottery, policy game or other game of chance. The possession forbidden by this section shall not apply to a possession had by a police officer, sheriff, deputy sheriff or other peace officer, judge or attache of a court or an attorney, when such possession is connected with the prosecution or investigation of a violation of this section, but the burden of offering evidence that the accused's possession is under this exception shall rest upon the accused. Expert testimony shall be admissible to show that the ticket, writing, paper, slip, document, memorandum,

list, article, matter or thing was customarily and usually used in the operation of a lottery, policy game, or other game of chance, and expert testimony shall also be admissible to show the contrary."

The petitioner demurred to the complaint filed against him by the said City of Birmingham (R. 2-3) which said demurrer was overruled by the trial court (R. 3). The petitioner pleaded not guilty to the allegations of said complaint filed by the respondent (R. 3). Whereupon, testimony was taken in support of said complaint and petitioner was found guilty by a jury, as charged in the City's said complaint, and his punishment was fixed at a fine of $100.00, and a sentence of ninety days hard labor for the City of Birmingham (R. 4). The trial court, pursuant to said jury verdict, sentenced the petitioner to hard labor for the City of Birmingham for 103 days for failure to pay the said fine fixed by the jury; said court also sentenced him to ninety days additional hard labor for said City, as prescribed by said jury's verdict, and to additional hard labor for Jefferson County for thirty-three days for payment of appeal court costs (R. 4).

The respondent duly and legally appealed from said verdict of the jury and judgment, fine and sentence by the court to the Court of Appeals of Alabama (R. 5).

On May 9, 1950, the Court of Appeals of Alabama affirmed this cause R. 6). Pertinent parts of the opinion of the Court of Appeals (R. 6-9).

On May 23, 1950, within the time prescribed by law and the rules of court, the petitioner filed his application for a rehearing in the Court of Appeals of Alabama in this cause (R. 13).

On June 20, 1950, the Court of Appeals of Alabama, extended its opinion in this cause, which said opinion appears on pages 13 to 15 of the record, and then said

court overruled petitioner's application for a rehearing (R. 15).

On July 1, 1950, within the time prescribed by law and the rules of court, the petitioner filed a petition in the Supreme Court of Alabama, praying that said court grant to your petitioner a writ of certiorari to the Court of Appeals of Alabama, in this cause, together with brief and argument in support of same, which said petition was denied on November 2, 1950 (R. 15). (Petition for writ of certiorari has been omitted pursuant to United States Supreme Court Rule 38 (8)).

On November 16, 1950, an application for rehearing was filed in this cause, in the Supreme Court of Alabama (R. 15), and on November 30, 1950, same was overruled by said court. (R. 16.)

Jurisdictional Statement

The jurisdiction of this court is invoked under Section 1257(3) of Title 28, of the United States Code of Judiciary and Judicial Procedure, which authorizes a review by the Supreme Court of the United States, by certiorari, in any cause wherein a final judgment or decree has been rendered as passed upon by the highest court of a state, "where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * *".

United States Supreme Court Rule 38, Section 5 (6), provides for a review by the Supreme Court of the United States, "where a state court has decided a Federal question of substance, not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

Where a right, title, claim or immunity is claimed under the Constitution of the United States, the Supreme Court of the United States must inquire not merely whether the

right, title, claim or immunity has been expressly denied, but also whether they have been denied in substance and effect, and it must review, independently, both legal issues, and the factual matters, with which they are commingled. *Oyama* vs. *State of California* (1948) 68 Sup. Ct. 269, 322, U. S. 633, 92 L. Ed. 249; *U. S.* vs. *Pink* (1942) 62 Sup. Ct. p. 552, 315 U. S. p. 203, 86 L. Ed. 796.

Petitioner claims the right to be tried in this prosecution, which has sentenced him to hard labor and deprived him of his liberty, in accordance with Due Process of Law as Prescribed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner contends that, under the provisions of United States Supreme Court Rule 38, there are special and important reasons why the writ of certiorari should be granted in this case, in that the courts of last resort of the State of Alabama Have Decided Substantial Federal Questions in a Way Probably not in Accord with Applicable Decisions of the Supreme Court of the United States.

The court of last resort of Alabama, the Supreme Court of that state, on November 30, 1950, overruled petitioner's application for certiorari to review the adverse opinion of the Court of Appeals of Alabama (R. 16), and this petition being filed within ninety days from the date of said action by the Alabama Supreme Court, is timely filed in the Supreme Court of the United States as prescribed by the provisions of Section 2101 C, Title 28, of the United States Code and United States Supreme Court Rule 38½.

The Question Involved Is Substantial

The conviction of petitioner cannot stand, if Section 600 of the 1944 General City Code of the City of Birmingham Violates the Fourteenth Amendment to the Constitution

of the United States, and Is Thereby Held to Be Unconstitutional by the Supreme Court of the United States.

This Honorable Court has not heretofore had occasion to consider the constitutionality of said ordinance of the City of Birmingham, *which precludes the petitioner and all others from denying his or her alleged guilt,* which flies squarely into the teeth of the decisions of this Court in *Tot* vs. *United States,* 319 U. S. 463, 63 Sup. Ct. 1241, 87 L. Ed. 1519; *Lindsley* vs. *Natural Carbonic Gas Co.* 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369. If this Honorable Court does not grant the petition for writ of certiorari, in this cause, the petitioner will be faced with immediate imprisonment and deprivation of his liberty, in accordance with the verdict of guilt by the jury and sentence of the court, pursuant thereto, as a result of a conviction for the alleged violation of an ordinance of the City of Birmingham, which petitioner strenuously insists violates the Fourteenth Amendment to the Constitution of the United States.

The question was timely and appropriately raised in the trial court by the filing of demurrers to the complaint (R. 2-3). The court overruled the demurrers (R. 3).

It is not necessary under the rules of practice in Alabama to except to the court's ruling on demurrer. *Dorrough* v. *Mackenson,* 231 Ala. 431, 165 So. 575; *Nunez* v. *Borden,* 226 Ala. 381, 147 So. 166.

A general demurrer to an indictment or complaint properly raises the question of constitutionality. *State* v. *Dillard,* 72 So. 56, 196 Ala. p. 539; *Beauvoir Club* v. *State,* 42 So. p. 1040, 148 Ala. p. 643.

The Alabama Court of Appeals, upon petitioner's insistence and presentation of the question, passed upon the question of whether or not Section 600, of the 1944 General City Code of the City of Birmingham contravenes the "Due Process Clause" of the Fourteenth Amendment to the

Constitution of the United States. Pertinent parts of the Alabama Court of Appeals opinion, together with said Court's extended opinion on application for a rehearing, are set out on pages 6 to 9 and 13 to 15 of the Record. Therefore, by authority of the decisions of the United States Supreme Court in *North Carolina R. Co.* v. *Zachary*, 232 U. S. p. 248, 34 Sup. Ct. 305, 58 L. Ed. 591; *Lisenba* v. *People of the State of California*, 314 U. S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166. Rehearing Denied, 315 U. S. 826, 62 Sup. Ct. 620, 86 L. Ed. 1222, this Honorable Court has the legal right and precedent to review the Federal Constitutional questions involved in the case of this petitioner.

The original opinion of the Alabama Court of Appeals in petitioner's case, among other things, states as follows:

"The other grounds of demurrer argued by appellant assert the unconstitutionality of the ordinance under which appellant was convicted, as being violative of the Fourteenth Amendment to the Constitution of the United States". R. 7.)

On petitioner's application for a rehearing, the Court of Appeals held that the following portion of Section 600, of the 1944 General Code of the City of Birmingham, does not cause said ordinance or Code section to be violative of the Constitution of the United States:

> "*It shall not be a defense to the charge of possession of the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing,* that it or any of them so possessed, have not actually been used, or were not then being used, or *were not intended to be used in the operation or in connection with the operation of a lottery,* polic ygame or other game of chance.' (R. 13-14.) (Emphasis ours.)

What paper, slip, matter or thing hereinabove referred to, as set out in the opinion of the Court of Appeals of Alabama, does the ordinance or Code section of the 1944 General City Code of the City of Birmingham refer to? It refers to any piece of blank paper, or blank slip, whether it be used as a telephone memorandum pad, or a laundry or grocery list, that could be used for the purpose of writing lottery numbers thereon. Lottery numbers can be written upon any paper, carved or burned upon a piece of wood, or marked in the sand. The City ordinance or Code Section in controversy *precludes anyone, regaraless of how innocent,* from explaining his or her possession of anything that might be used in and about the operation of a lottery. A pencil, a writing pen, ink, or a piece of chalk could be used. An innocent person could find a lottery ticket while walking upon a public street and, while looking at it, never having seen one before, could be arrested and would be denied the right to explain his or her innocence.

An additional part or portion of Section 600 of the 1944 General City Code of the City of Birmingham is believed to violate the Fourteenth Amendment to the Constitution of the United States.

> "Any person who possesses any ticket, writing, paper * * * matter or thing of any nature or kind whatsoever, which is customarily or usually used in the operation of a lottery, policy game or other game of chance, of any sort or kind, shall upon conviction be punished * * *".

Further, the ordinance states, among other things:

> "To constitute the offense created by this section it shall not be necessary, that the ticket, writing, paper * * * matter or thing, be actually used, or actually be in use or *is yet actually to be used* in operation of a lottery * * *."

Petitioner strongly believes that this ordinance of the City of Birmingham is not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Lanzetta, et al.* v. *State of New Jersey,* 306 U. S. p. 451, 59 Sup. Ct. p. 618, 83 L. Ed. 888.

Persons to whom a statute (or ordinance) is addressed, should know what standard of conduct is required of them. *Cline* v. *Frink Dairy Co.,* 49 Sup. Ct. p. 681, 274 U. S. p. 445, 71 L. Ed. 1146.

By applying for a rehearing to the Court of Appeals of Alabama, which said Court denied the application but extended the opinion (R. 13-15), and by subsequently petitioning the Supreme Court of Alabama for a writ of certiorari which was denied without an opinion (R. 15), and, further, by applying to the said Supreme Court of Alabama for a rehearing (R. 15-16) which was denied without an opinion (R. 16), your petitioner consistently preserved the Federal constitutional questions and exhausted his every possible chance of relief by and through the State courts.

It is respectfully submitted that the decision of the courts of last resort of the State of Alabama, in this case, upon petitioner's claim of Federal constitutional rights, is inconsistent with the following applicable decisions of this court:

Tot v. *United States,* 319 U. S. 463, 63 Sup. Ct. 1241, 87 L. Ed. 1519;

Mobile, Jackson & K. C. Rr. Co. v. *J. A. Turnipseed, Admr.,* 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N.S.) 226, Ann. Cases 1912 A, p. 463;

Lindsley v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cases 1912 C, p. 1607;

Bailey v. *Alabama,* 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191;

Adams v. *People of the State of New York,* 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575;
Manley v. *State of Georgia,* 279 U. S. 1, 49 Sup. Ct. 215, 73 L. Ed. 575;
Hawes v. *State of Georgia,* 258 U. S. 1, 42 Sup. Ct. 204, 66 L. Ed. 431;
Winters v. *People of the State of New York,* 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840;
Lanzetta, et al. v. *State of New Jersey,* 306 U. S. 451, 59 Sup. Ct. 618, 83 L. Ed. 888;
Cline v. *Frink Dairy Co.,* 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146.

These decisions all demonstrate the sufficiency and importance of the questions and the reasons for the exercise by this court of its discretionary certiorari jurisdiction.

The Questions Presented

1. The Court of Appeals of Alabama, by its opinions in this cause, and the Supreme Court of Alabama, by its refusal to grant certiorari to said Court of Appeals of Alabama, has affirmed the conviction of the petitioner, thereby sentencing him to hard labor and confinement for the alleged violation of an ordinance of the City of Birmingham which violates the Fourteenth Amendment to the Constitution of the United States, in that the possession of certain items described in said ordinance Conclusively Presumes One so Charged Under Said Ordinance to be Guilty, Without Affording the Accused the Right to Testify and Explain His or Her Innocence.

2. The Court of Appeals of Alabama by its opinions in this cause, and the Supreme Court of Alabama by its refusal to grant certiorari to said Court of Appeals of Alabama, has affirmed the conviction of the petitioner, thereby sentencing him to hard labor and confinement for the alleged

violation of an ordinance of the City of Birmingham which violates the Fourteenth Amendment to the Constitution of the United States, in that said ordinance is so vague as to make criminal an innocent act and fails to state the alleged offense attempted to be described therein, with sufficient certainty so as to inform the public as to what standard of conduct is required of them.

Reasons Relied On for the Allowance of the Writ

1. The Court of Appeals of Alabama in this cause decided the Federal question of substance, that the part of Section 600 of the 1944 General City Code of the City of Birmingham, Alabama, precluding your petitioner, and all others, from asserting his or her innocence, when charged with an offense under said ordinance, does not violate the Fourteenth Amendment to the Constitution of the United States, the pertinent part of said ordinance being as follows:

> "It shall not be a defense to the charge of possession of the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing, that it or any of them so possessed have not actually been used, or were not then being used, or were not intended to be used, in the operation or in connection with the operation of a lottery, policy game or other game of chance."

Said decision of the Court of Appeals of Alabama, which the Supreme Court of Alabama refused to review on petitioner's petition for writ of certiorari, is not in accord with the decisions of this court, including the decisions rendered in *Tot* vs. *United States,* 319 U. S. p. 463, 63 Sup. Ct. 1241, 87 L. Ed. 1519; *Lindsley* vs. *Natural Carbonic Gas Co.* 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369.

2. The Court of Appeals of Alabama in this cause decided the Federal question of substance, that Section 600

of the 1944 General City Code of the City of Birmingham, Alabama, does not violate the Fourteenth Amendment to the Constitution of the United States, in that same is not so vague as to make criminal an innocent act, and does not fail to state the alleged offense with sufficient certainty so as to inform the public as to what standard of conduct is required of them.

Said decision of the Court of Appeals of Alabama, which the Supreme Court of Alabama refused to review on petitioner's petition for a writ of certiorari, is not in accord with the decisions of this Court, including the decisions rendered in *Lanzetta, et al.* vs. *State of New Jersey,* 306 U. S. 451, 59 Sup. Ct. p. 618, 83 L. Ed. p. 888; *Winters* vs. *People of the State of New York,* 333 U. S. 507, 68 Sup. Ct. p. 665, 92 L. Ed. 840; *Cline* vs. *Frink Dairy Co.,* 247 U. S. p. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146.

3. The petitioner has exhausted his remedy in the courts of Alabama, and the judgment and sentence appealed from is a final judgment of conviction, and presents Federal questions of substance and importance worthy of consideration by the Supreme Court of the United States.

Prayer for Writ

WHEREFORE, your petitioner prays that a writ of certiorari issue by this Honorable Court to the Court of Appeals of Alabama, to the end that the errors aforesaid described may be corrected.

Respectfully submitted,

JAMES T. GIBSON, JR.,
Frank Nelson Building,
Birmingham, Alabama,
Counsel for Petitioner.

FILED
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CHARLES ELMORE CROPLEY
CLERK

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BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

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BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

Opinion Below

The original opinion of the Court of Appeals of Alabama, and the extended opinion on petitioner's application for rehearing by the same court, is reported in the Advance Sheet of the Southern Reporter, Vol. 48 (2) pp. 761 to 768, inclusive. Pertinent parts thereof appear on pages 6 to 9, and 13 to 15, of the Record. There was no opinion written by the Supreme Court of Alabama when said Court denied petitioner's petition for a writ of certiorari to the Court of Appeals of Alabama. 48 So. (2) p. 768.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, of the United States Code of Judicial

and Judiciary Procedure. The courts of last resort of the State of Alabama have decided two substantial claims of Federal constitutional rights adversely to petitioner, in a way not in accordance with the applicable decisions of this Court (United States Supreme Court Rule 38).

The judgment of the Court of Appeals of Alabama became final November 30, 1950 (R. 16) when the Supreme Court of Alabama denied petitioner's application for a rehearing on his petition to said Court for a writ of certiorari to the Court of Appeals of Alabama in this cause.

The petition is timely filed in this Court, within the ninety day period, as prescribed by Section 2101, Title 28, U. S. Code of Judicial and Judiciary Procedure, and U. S. Supreme Court Rule 38½.

The Court of Appeals of Alabama, upon petitioner's insistence and presentation of the question, passed upon the question of whether or not Section 600 of the 1944 General City Code of the City of Birmingham, under which petitioner was prosecuted and convicted, violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and said Court decided same adversely to the petitioner. Therefore, this Honorable Court has the legal right and precedent to review said Court's decision relative to the Federal constitutional questions, as authorized by the decisions of this Court in *North Carolina R. Co.* v. *Zachary*, 232 U. S. p. 248, 34 Sup. Ct. 305, 58 L. Ed. 591; *Lisenba* v. *People of the State of California*, 314 U. S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166.

Municipal ordinances constitute state action, and are within the prohibition of the Fourteenth Amendment. *Lovell* v. *City of Griffin, Georgia*, 303 U. S. p. 444, 58 Sup. Ct. 666, 82 L. Ed. p. 949.

Statement of the Case

The petitioner was convicted and fined $100.00 and costs, and sentenced to 180 days hard labor, in the Recorders Court of the City of Birmingham, Alabama, for the violation of Section 600 of the 1944 General City Code of the City of Birmingham, which said section of said Code is as follows:

> "Any person who possesses any ticket, writing, paper, slip, document, memorandum, list, article, matter or thing of any nature or kind whatsoever, which is customarily or usually used in the operation of a lottery, policy game, or game of chance of any sort or kind, or which is of a kind which is customarily used in the operation of a lottery, policy game, or other game of chance of any sort or kind, shall, upon conviction, be punished in the manner and within the limits specified by section 4. To constitute the offense created by this section it shall not be necessary that the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing be actually used, or actually be in use or is yet actually to be used in the operation of a lottery, policy game or other game of chance. It shall not be a defense to the charge of possessing the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing that it or any of them so possessed have not actually been used or were not then being used, or were not intended to be used in the operation or in connection with the operation of a lottery, policy game or other game of chance. The possession forbidden by this section shall not apply to a possession had by a police officer, sheriff, deputy sheriff or other peace officer, judge or attache of a court or an attorney, when such possession is connected with the prosecution or investigation of a violation of this section, but the burden of offering evidence that the accused's possession is under this exception shall rest upon the accused. Expert testimony shall be admissible to show that the ticket, writing, paper, slip, document,

memorandum, list, article, matter or thing was customarily and usually used in the operation of a lottery, policy game, or other game of chance, and expert testimony shall also be admissible to show the contrary'' (Appendix A).

The petitioner appealed his said conviction to the Circuit Court of the Tenth Judicial Circuit at Birmingham, and demanded a jury trial (R. 1). When said appeal was called for trial in said Circuit Court, the City of Birmingham, through its attorney, filed a complaint, charging the petitioner with the offense of violating Section 600, of the 1944 General City Code of the City of Birmingham, as hereinabove set out (R. 2). The petitioner filed separate and several grounds of demurrer to said complaint, attacking the sufficiency thereof (R. 2-3). The Court overruled the demurrers (R. 3). The petitioner pleaded Not Guilty (R. 4). A jury was selected, testimony was taken, and the petitioner was sentenced to pay a $100.00 fine and costs, and perform hard labor for the City of Birmingham for 90 days (R. 4). The respondent appealed to the Court of Appeals of Alabama (R. 5). The Court of Appeals of Alabama affirmed the conviction (R. 6). The petitioner filed an application for rehearing, which the Court of Appeals of Alabama overruled (R. 13). Petitioner filed a petition for a writ of certiorari in the Supreme Court of Alabama, praying for a writ of certiorari to the Court of Appeals of Alabama, which said petition was denied by said Court without writing an opinion (R. 15). Petitioner applied to the Supreme Court of Alabama for a rehearing (R. 15-16), which was overruled without an opinion (R. 16).

The petitioner then filed his petition in this Court, praying for a writ of certiorari to the Court of Appeals of Alabama, in this cause.

The points raised by demurrer to the complaint of the City of Birmingham, and argued to the appellate courts, are as follows:

A. Does that part of Section 600 of the 1944 General City Code of the City of Birmingham, as follows:

> "It shall not be a defense to the charge of possession of the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing, that it or any of them so possessed have not actually been used, or were not then being used, or were not intended to be used, in the operation or in connection with the operation of a lottery, policy game or other game of chance."

contravene the *Due Process Clause* of the Fourteenth Amendment to the Constitution of the United States?

B. Does Section 600 of the 1944 General Code of the City of Birmingham violate the *Due Process Clause* of the Fourteenth Amendment to the Constitution of the United States, in that same is so vague as to make criminal an innocent act and does not inform the public as to what standard of conduct is required of them?

Specifications of Error

1. The Court of Appeals of Alabama erred in affirming the judgment of conviction in this cause, in which petitioner was convicted for the alleged violation of an ordinance of the City of Birmingham, which violates the *Due Process Clause* of the Fourteenth Amendment to the Constitution of the United States, In That Same Precludes Anyone Charged Thereunder From Denying His or Her Guilt.

2. The Court of Appeals of Alabama erred in affirming the judgment of conviction in this cause, in which petitioner was convicted for the alleged violation of an ordinance of the City of Birmingham which violates the *Due Process*

Clause of the Fourteenth Amendment to the Constitution of the United States, in that same Is So Vague as to Make Criminal an Innocent Act, and Does Not Inform the Public as to What Standard of Conduct Is Required of Them.

POINT ONE

An ordinance or statute which conclusively presumes guilt and precludes the defendant from asserting his or her innocence, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Tot v. *United States,* 319 U. S. 463, 63 Sup. Ct. 1241, 87 L. Ed. 1519;

Mobile, Jackson & K. C. Rr. Co. v. *J. A. Turnipseed, Admr.,* 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cases 1912 A, p. 463;

Lindsley v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cases 1912 C, p. 1607;

Bailey v. *Alabama,* 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191;

Adams v. *People of the State of New York,* 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575;

Manley v. *State of Georgia,* 279 U. S. 1, 49 Sup. Ct. 215, 73 L. Ed. 575.

POINT TWO

An ordinance or statute so vague as to make criminal an innocent act, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Winters v. *People of the State of New York,* 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840.

Point Three

An ordinance or statute which does not explicitly inform the public as to what standard of conduct is required of them, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Winters vs. *People of the State of New York,* 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840;
Stromberg vs. *People of the State of California,* 283 U. S. 359, 51 Sup. Ct. 532, 75 L. Ed. 1117;
Cline vs. *Frink Dairy Co.,* 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146;
Lanzetta, et al. vs. *State of New Jersey,* 306 U. S. 451, 59 Sup. Ct. 618, 83 L. Ed. 888;
International Harvester Co. v. *Kentucky,* 234 U. S. 216, 34 Sup. Ct. 863, 58 L. Ed. 1284;
Connally v. *General Construction Co.,* 269 U. S. 385, 46 Sup. Ct. 126, 70 L. Ed. 322.

Point Four

If a state court passes upon a federal constitutional question, regardless of the manner or procedure the point is raised in the state court, the United States Supreme Court can review the decision.

North Carolina R. Co. vs. *Zachary,* 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591;
Lisenba vs. *People of the State of California,* 314 U. S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166. Rehearing Denied, 315 U. S. 826, 62 Sup. Ct. 620, 86 L. Ed. 1222.

POINT FIVE

Municipal ordinances adopted under state authority constitute state action and are within the prohibition of the Fourteenth Amendment to the United States Constitution.

Lovell vs. *City of Griffin, Georgia,* 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949.

POINT SIX

"All courts in or of the State of Alabama shall take judicial notice of all ordinances, laws and by-laws of cities of the State of Alabama which now or may hereafter have a population of 200,000 or more people according to the last or any succeeding federal census."

Title 7, Section 429 (1), 1947 Cum. Supp. 1940 Code of Alabama.

POINT SEVEN

The Court of Appeals of Alabama takes judicial notice of the federal census.

Taylor vs. *State,* 105 So. 915, 21 Ala. App. 157;
Burnette vs. *State,* 181 So. Rep. 299, 28 Ala. App. 110.

The 1940 federal census shows the population of the City of Birmingham, Alabama, to be 267,583.

Vol. 1, Page 70, Bureau of Census (16th Census of the U. S. 1940). Published by the U. S. Department of Commerce.

POINT EIGHT

A general demurrer to an indictment or complaint properly raises the question of constitutionality.

State vs. *Dillard,* 72 So. 56, 196 Ala. 539;
Beauvoir Club vs. *State,* 42 So. 1040, 148 Ala. 643.

Point Nine

It is not necessary under the rules of practice in Alabama to except to the court's ruling on demurrer.

Dorrough vs. *Mackenson,* 231 Ala. 431, 165 So. 575;
Nunez vs. *Borden,* 226 Ala. 381, 147 So. 166.

Argument

I

This petition for a writ of certiorari to be directed to the Court of Appeals of Alabama, raises two important Federal constitutional questions which shall be argued to this Honorable Court separately.

It is contended by the petitioner that Section 600 of the 1944 General Code of the City of Birmingham (Appendix A) contravenes the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which question is raised by demurrer and was argued and presented by counsel and passed upon by the Court of Appeals of Alabama, contrary to petitioner's contention.

That part of said city ordinance or Code section of the City Code which petitioner desires to discuss at this time, is as follows:

> "It shall not be a defense to the charge of possession of the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing, that it or any of them so possessed have not actually been used, or were not then being used, or were not intended to be used, in the operation or in connection with the operation of a lottery, policy game or other game of chance." (Appendix A.)

This ordinance or Code section was referred to in the complaint under which petitioner was convicted, and pre-

cludes anyone, regardless of how innocent, from asserting his or her defense. That said portion of said ordinance or Code section as hereinabove referred to, in its final analysis, says:

> "It shall not be a defense to the charge of possession, of the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing, that it or any of them so possessed * * * were not intended to be used in the operation or in connection with the operation of a lottery, policy game or other game of chance." (Appendix A.)

This portion of the ordinance refers to a prior portion thereof which states, among other things, as follows:

> "Any person who possesses any ticket, writing, paper, slip, document, memorandum, list, article, matter or thing, of any nature or kind whatsoever, which is customarily or usually used in the operation of a lottery, policy game or game of chance, of any sort or kind * * * shall upon conviction be punished * * *. To constitute the offense created by this section, it shall not be necessary that the ticket, writing, * * * matter or thing, be actually used, or actually being used *or is yet actually to be used in the operation of a lottery* * * *."

In other words, any person who possesses a plain piece of paper, a telephone memorandum pad, a pencil, pen, a bottle of ink, a piece of chalk, regardless of how innocent the possession may be, even for a moment, is guilty of violating a criminal law and his or her liberty can be taken away without said person having been given the opportunity to present his or her defense, and asserting his or her innocence.

Under this state of facts, if allowed to stand, the prosecution could prove its case without proof of any sort other than the fact that a person, regardless of how innocent, had

in his or her possession, if only for a second, some article which could be used in and about the operation of a lottery, such as are commonly used by the overwhelming majority of the people in and about the conduct of legitimate business, such as plain paper, pencils, pens and ink.

This Honorable Court held in the case of *Tot* v. *United States*, 319 U. S. 463, 63 Sup. Ct. 1241, 87 L. Ed. 1519, among other things, as follows:

> "It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.
>
> "Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, *it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence.* And this we think enough to vitiate the statutory provision. * * *
>
> "It would, therefore, be a convenience to the government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. * * *
>
> "If the presumption warrants conviction unless the defendant comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted, *the defendant is under the handicap, if he takes the witness stand, of admitting prior convictions of*

violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given." (Emphasis ours.)

In the same decision of this Court, *Tot* v. *United States, supra,* Mr. Justice Black, with Mr. Justice Douglas concurring, stated, among other things, as follows:

"The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of this statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense. The procedural safeguards found in the Constitution and in the Bill of Rights, Chambers v. Florida, 309 U. S. 227, 60 Sup. Ct. 472, 477, 84 L. Ed. 716, stand as a constitutional barrier against thus obtaining a conviction. * * *

"These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant *must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions which, of course, constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observation cannot be sustained."* (Emphasis ours.)

In the decision just quoted from, viz: *Tot* v. *United States, supra,* the defendant, Tot, was allowed to take the stand and testify in his behalf, and this Honorable Court held that the statute under which he was convicted was unconstitutional, and reversed the conviction as to the said Tot.

The Court further stated, in substance, that it was unnecessary to consider whether or not the statute in the *Tot* case which put the defendant, against whom no evidence of guilt had been offered, in a procedural situation from which

he could escape conviction only by testifying, compelled him to give evidence against himself in violation of the Fifth Amendment to the Constitution of the United States.

It is the humble belief of petitioner's counsel that in the case at bar Section 600 of the 1944 General City Code of the City of Birmingham, Alabama, violates the Fifth Amendment to the Constitution of the United States for the reason that, even though a trial court, contrary to the provisions of said Code section, allowed a defendant to testify, in effect, that he had found a lottery slip on a public sidewalk and did not know what it was, in an effort to prove his innocence, this would be forcing him to testify in a case wherein he was a defendant, thereby compelling him to admit that he did have a blank piece of paper, lottery slip, pencil, pen or ink, which could be used in and about the writing of lottery tickets or otherwise, in and about the operation of a lottery.

However, construing the city ordinance of the City of Birmingham as it is written, it is insisted by the petitioner that the trial court does not have the legal right to allow a defendant to testify in his or her defense.

There are many decisions of this Court holding that a statute or ordinance may make possession of a prohibited article prima facie evidence of guilt, with the right on behalf of the defendant to express his or her innocence. Counsel for petitioner, after a careful study, has found no decisions of this Court holding that under any circumstances can a defendant be precluded from declaring his or her innocence when charged with an offense.

This Honorable Court, in the case of *Manley* v. *State of Georgia*, 279 U. S. 1, 49 Sup. Ct. 215, 73 L. Ed. 575, held:

> "If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. * * *

"It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." (Emphasis ours.)

This Honorable Court, in the case of *Adams* v. *People of the State of New York,* 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, in passing on a lottery statute which is not nearly as drastic as the one involved in the case at bar, stated, among other things, that the statute of the State of New York stating that " * * * any paper, print, writing, numbers or device, policy slip or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called 'policy' is presumptive evidence of possession thereof knowingly and in violation of the provisions of section three hundred and forty-four a", raises some inference against the possessor in the absence of an explanation. The Court held further that same was not unconstitutional in that: "Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips."

This is contrary to the case at bar. The ordinance involved in the case at bar says: "It shall not be a defense", etc. In other words, there is a conclusive presumption in the case at bar rather than a prima facie presumption as described in *Adams* v. *People of the State of New York, supra.* This court, in the case of *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cases 1912 C, p. 1607, in its opinion, stated, among other things:

"So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision, not unreasonable in itself, prescribing a rule of evidence, in

> either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense, all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

This Court, in the case of *Mobile, Jackson & K. C. R. Co.* v. *J. A. Turnipseed, Admr.*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N.S.) 226, Ann. Cases 1912 A, p. 463, held exactly the same principle of law as does the decision of this Court in *Bailey* v. *Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191.

It is earnestly believed, by counsel for petitioner, that the ordinance or statute of the City of Birmingham, same being numbered 600, as set out in Appendix A, violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, in that, as hereinabove stated, same conclusively precludes a defendant's assertion of his innocence.

II

Petitioner earnestly contends that Section 600 of the 1944 General Code of the City of Birmingham, Alabama (Appendix A) also contravenes the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, in that same is so vague as to make criminal an innocent act, and, further, that same does not apprise the public as to what standard of conduct is required of them.

The Supreme Court of the United States held in the case of *Winters* v. *People of the State of New York*, 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840, among other things:

> "The standard of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement, and crime must be defined with appropriate definiteness and there must be ascertainable standards of guilt.

> "Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act * * * or in regard to the applicable tests to ascertain guilt * * *.
>
> "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."

This Honorable Court, in the case of *Lanzetta, et al.* v. *State of New Jersey,* 306 U. S. 451, 59 Sup. Ct. 618, 83 L. Ed. 888, among other things, stated as follows:

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. * * * The applicable rule is stated in Connally vs. General Const. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; *and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.*" (Emphasis ours.)

The principle hereinabove enunciated was stated at length in the case of *Stromberg* v. *People of the State of California,* 283 U. S. 359, 51 Sup. Ct. 532, 75 L. Ed. 1117, together with the decision of this Honorable Court in *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146.

It is earnestly believed that where a statute as vague and indefinite as Section 600 of the 1944 General City Code of the City of Birmingham, makes criminal the possession of

harmless articles, normally in use by business men in the conduct of normal and legal business, same contravenes the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

It may be that counsel for the respondent may argue something relative to whether or not the question regarding the constitutionality of the city ordinance is properly before this Honorable Court. In that regard, petitioner's counsel wishes to quote an excerpt from a decision of this Court in the case of *Winters* v. *People of the State of New York,* 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840, which is as follows:

> "The validity of the statute was drawn in question in the state courts as repugnant to the Fourteenth Amendment to the Constitution of the United States * * *. As the validity of the section was upheld in a final judgment by the highest court of the state against this constitutional challenge, this Court has jurisdiction under Judicial Code, § 237(a), 28 U. S. C. A. § 344(a)."

This is true in accordance with the decision of this Court regardless of the manner or procedure raising the point in the state court. *North Carolina R. Co.* v. *Zachary,* 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591; *Lisenba* v. *People of the State of California,* 314 U. S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166, Rehearing Denied, 315 U. S. 826, 62 Sup. Ct. 620, 86 L. Ed. 1222.

This Honorable Court also held, among other things, in the case of *Lovell* v. *City of Griffin, Georgia,* 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949, as follows:

> "It is also well settled that municipal ordinances, adopted under state authority, constitute state action and are within the prohibition of the amendment."

Although Section 600 of the 1944 General City Code of the City of Birmingham is not set out in toto in the complaint filed against the petitioner, or in the record in this case, this Court's attention is invited to a Code section of the State of Alabama which is as follows:

> "All courts in or of the State of Alabama shall take judicial notice of all ordinances, laws and by-laws of the cities of the State of Alabama which now, or may hereafter, have a population of 200,000 or more people according to the last or any succeeding federal census."
> Title 7, Sec. 429 (1), 1947 Sup. to the 1940 Code of Alabama (Appendix B).

The Court of Appeals of Alabama takes judicial notice of the federal census. *Burnette* v. *The State,* 181 So. 299, 28 Ala. App. 110; *Taylor* v. *The State,* 105 So. 915, 21 Ala. App. 157.

The 1940 Federal Census shows the population of the City of Birmingham, Alabama, to be 267,583. Vol. 1, P. 70 Bureau of Census, (16 Census of the United States 1940) published by United States Department of Commerce (Appendix C).

It is again reiterated that the petitioner has been deprived of his liberty by a conviction upon a city ordinance which contravenes the Fourteenth Amendment to the Federal Constitution.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals of Alabama should be granted.

Respectfully submitted,

JAMES T. GIBSON, JR.,
Frank Nelson Building,
Birmingham, Alabama,
Counsel for Petitioner.

APPENDIX A

SECTION 600, 1944 GENERAL CITY CODE OF THE CITY OF BIRMINGHAM, ALABAMA:

"Any person who possesses any ticket, writing, paper slip, document, memorandum, list, article, matter or thing of any nature or kind whatsoever, which is customarily or usually used in the operation of a lottery, policy game, or game of chance of any sort or kind, or which is of a kind which is customarily used in the operation of a lottery, policy game, or other game of chance of any sort or kind, shall, upon conviction be punished in the manner and within the limits specified by section 4. To constitute the offense created by this section it shall not be necessary that the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing be actually used, or actually be in use or is yet actually to be used in the operation of a lottery, policy game or other game of chance. It shall not be a defense to the charge of possession the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing that it or any of them so possessed have not actually been used or were not then being used, or were not intended to be used in the operation or in connection with the operation of a lottery, policy game or other game of chance. The possession forbidden by this section shall not apply to a possession had by a police officer, sheriff, deputy sheriff or other peace officer, judge or attache of a court or an attorney, when such possession is connected with the prosecution or investigation of a violation of this section, but the burden of offering evidence that the accused's possession is under this exception shall rest upon the accused. Expert testimony shall be admissible to show that the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing was customarily and usually used in the operation of a lottery, policy game, or other game of chance, and expert testimony shall also be admissible to show the contrary."

APPENDIX B

TITLE 7, SECTION 429 (1), 1947 CUMULATIVE SUPPLEMENT, 1940 CODE OF ALABAMA:

> "All courts in or of the State of Alabama shall take judicial notice of all ordinances, laws and by-laws of cities of the State of Alabama which now or may hereafter have a population of 200,000 or more people according to the last or any succeeding federal census."

APPENDIX C

VOL. 1, PAGE 70, BUREAU OF CENSUS (16th CENSUS OF THE U. S. 1940). UNITED STATES DEPARTMENT OF COMMERCE:

The 1940 Federal Census shows the population of the City of Birmingham to be 267,583.

FILED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 562

SAM FIORELLA,

Petitioner,

v.

THE CITY OF BIRMINGHAM,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO. 502

SAM FIORELLA,
Petitioner,

vs.

THE CITY OF BIRMINGHAM,
Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

OPINION BELOW

The original opinion of the Court of Appeals of Alabama, and the extended opinion on petitioner's application for rehearing by the same court, is reported in the Advance Sheet of the Southern Reporter, Vol. 48 (2) pp. 761 to 768, inclusive. (pages 6 to 15 of the Record). There was no opinion written by the Supreme Court of Alabama when said Court denied petitioner's petition for a writ of certiorari to the Court of Appeals of Alabama. 48 So. (2) p. 768.

STATEMENT OF THE CASE

The Statement of the Case as set out in Brief and Argument in Support of Petition for Certiorari heretofore filed in this case is substantially correct.

SUMMARY OF THE ARGUMENT

1. In criminal proceedings the accused, in order to question the constitutionality of a statute or ordinance must show that his rights are adversely affected by the particular feature of the statute or ordinance alleged to be unconstitutional.

The petitioner argues that Section 600 of the General City Code of Birmingham of 1944 prohibits the possession of "a plain piece of paper . . . ," etc. The appellate courts of Alabama have held specifically that the ordinance did not prohibit the possession of a "simple tablet of paper . . . ," etc. In enforcing said City Code section the City of Birmingham is bound by the interpretation placed thereon by the appellate courts of Alabama. When the section is examined in the light of said opinion it is clearly not subject to the defects pointed out by petitioner.

2. Section 600 of the General City Code of Birmingham of 1944 does not establish a presumption of guilt against a defendant or prevent a defendant from asserting his or her innocence under said section. The said section does not involve a presumption at all as argued by petitioner; it merely prohibits the *possession* of certain articles customarily used in the operation of a lottery, etc. The issue in a case under the section would be (1) did the defendant have the articles in his possession, and (2) were they such articles as are prohibited by the said Code section. Clearly, no presumption is involved.

3. Section 600 of said City Code is not so vague as to make criminal an innocent act nor does it fail to set up

a standard of conduct. The standard is whether or not the article in question is such as *"is customarily or usually used in the operation of a lottery."* This is a question of fact which would have to be proved in any prosecution under the section. The ignorance of the individual that the article or other matter in his possession "is customarily or usually used in the operation of a lottery" is immaterial and must be so held to effectuate the purpose of the legislative body enacting the said City Code section. The appellate courts of Alabama have held in effect that the articles, etc., prohibited by the section are such as are peculiar to the operation of a lottery and not articles such as, "a plain piece of paper, a telephone memorandum pad, a pencil, pen, a bottle of ink, a piece of chalk, . . . " as argued by petitioner. Scienter is not a necessary element of every offense and whether it is an element of a statutory offense is a question of legislative intent; and in such a case the punishment of a person for an act in violation of law, when he is ignorant of the facts making it so, does not deny due process of law.

ARGUMENT

I

IN CRIMINAL PROCEEDINGS THE ACCUSED, IN ORDER TO QUESTION THE CONSTITUTIONALITY OF A STATUTE OR ORDINANCE MUST SHOW THAT HIS RIGHTS ARE ADVERSELY AFFECTED BY THE PARTICULAR FEATURE OF THE STATUTE OR ORDINANCE ALLEGED TO BE UNCONSTITUTIONAL.

The petitioner as set out in the opinion of the Court of Appeals of Alabama (page 9 of transcript) was found in possession of 76 (74 in the bag which he carried and 2 in his automobile) numbered plastic balls and one unnum-

bered ball, all of which the jury found was of a type customarily used in the operation of a policy game. The petitioner therefore has not been convicted of possessing, "a plain piece of paper, a telephone memorandum pad, a pencil, pen, a bottle of ink, a piece of chalk," as argued on page 10 of Brief filed by petitioner's counsel. Such articles as enumerated by petitioner's counsel are not prohibited by Section 600 of the General City Code of Birmingham of 1944 and the decisions of the Court of Appeals of Alabama and of the Supreme Court of Alabama have construed the said section as not prohibiting the possession of such articles. *City of Birmingham v. Reed,* Ala. App. 44 So. 2d 607, at pages 613, 614; *Fiorella v. City of Birmingham,* Ala. App. 48 So. 2d 761, certiorari denied by the Supreme Court of Alabama, 48 So. 768. In *City of Birmingham v. Reed, supra,* the Court of Appeals of Alabama in regard to Section 600 of said City Code, in its opinion stated that

> "Appellant argues that under the above ordinance the possession of a simple tablet of paper constitutes an offense. We do not agree. . . . "

I submit to this Honorable Court that unless the petitioner shows that Section 600 of said City Code has been construed by the Supreme Court of Alabama or the Court of Appeals of Alabama in such a manner as argued by him he has no right to question the constitutionality of said section on such grounds in this Court. 16 C. J. S., Section 84, p. 176 (Constitutional Law); *Mauk v. U. S.,* 88 F. 2d 557, certiorari denied, 58 S .Ct. 17, 302 U. S. 684, 82 L. Ed. 528.

ARGUMENT

II

SECTION 600 OF THE GENERAL CITY CODE OF BIRMINGHAM OF 1944 (APPENDIX A) DOES NOT CONTRAVENE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT CONCLUSIVELY PRESUMES GUILT AND PRECLUDES THE DEFENDANT FROM ASSERTING HIS OR HER INNOCENCE.

Counsel in his Brief in Support of Certiorari is mistaken as to the issue involved in a prosecution under Section 600 of the General City Code of Birmingham of 1944. The ordinance makes it unlawful (subject to certain exceptions set out therein) for any person to possess within the City of Birmingham certain articles named therein which are customarily or usually used in the operation of a lottery, policy game, etc. The issue in a prosecution under this ordinance would be (1) whether or not the defendant had in his possession the prohibited articles and (2) whether or not the article which was found in the possession of the defendant is prohibited by the ordinance.

There is no presumption against the defendant in regard to these facts. The prosecution must prove both facts. The defendant is not prohibited from offering evidence in his defense that (1) he did not have the articles in his possession or (2) that although the articles were in his possession they are not such as are prohibited by the ordinance.

The case of *Ford v. State*, 85 Md. 465, 37 Atl. 172, 41 L. R. A. 551, 60 Am. St. Rep. 337 decided by the Court of Appeals of Maryland construed a statute which is very similar to the Code section under consideration. This case involved a lottery law of the State of Maryland and it pro-

hibited the possession of "any book, list, slip or record of any lottery ticket or anything in the nature thereof."

Section 600 of the General City Code of Birmingham prohibits possession of "any ticket, writing, paper, slip, document, memorandum, list, article, matter or thing of a nature or kind whatsoever, which is customarily or usually used in the operation of a lottery."

The court in the opinion rendered in *Ford v. State, supra,* stated that,

> "(the defendant) had the perfect right to prove either that the articles charged in the indictment were not found in his possession, or that those found were not such as the law prohibits him from having. That is the issue made by the statute . . . , it makes it a crime for him to have in his possession that which . . . injuriously affects the morals and interferes with the welfare of the people; and it is evident that the statute has made the mere possession of the articles a crime, because that is the most effectual way to break up the lottery business."

It is therefore respectfully suggested to this Honorable Court that said Section 600 of the General City Code of Birmingham of 1944 does not raise any presumption of guilt against a defendant nor does it preclude a defendant from asserting his or her innocence under said section. The Court of Appeals of Alabama in *City of Birmingham v. Reed, supra,* at page 613, in considering the opinions of this Court in regard to laws similar to Section 600 of said Code set out the following in its opinion:

> "The following observations by Chief Justice Taft, in United States v. Balint, 258 U. S. 250, 42 S. Ct. 301, 302, 66 L. Ed. 604, are pertinent to the ordinance now under consideration, such ordinance being aimed at conduct and acts highly detrimental to society, and which by common knowledge are carried out in such varied and complicated channels, and by such devious routes, as to prevent a detailed description of such acts in ordi-

nances and statutes aimed at their suppression: "While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did (252) not in terms include it, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 69, 70, 30 S. Ct. 663, 666, 54 L. Ed. 930 (935, 936), in which it was held that in the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."

ARGUMENT

III

SECTION 600 OF THE GENERAL CITY CODE OF BIRMINGHAM OF 1944 (APPENDIX A) DOES NOT CONTRAVENE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT IS SO VAGUE AS TO MAKE CRIMINAL AN INNOCENT ACT OR THAT IT FAILS TO SET A STANDARD OF CONDUCT.

Section 600 of the General City Code of Birmingham of 1944 makes the mere possession of certain articles enu-

merated therein unlawful. However, that is not a denial of due process. Mr. Chief Justice Taft of this court held in the case of United States v. Balint, 258 U. S. 250, 42 S. Ct. 301, 302, 66 L. Ed. 604, that the punishment of a person for an act in violation of law, when he is ignorant of the facts making it so, does not deny due process of law. The possession of the articles which the ordinance forbids is the prohibited act. In United States v. Balint, supra, this court held that in the prohibition or punishment of particular acts, the state in the maintenance of a public policy may provide " . . . that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance."

If it be necessary to refer to any authority to show that the laws for the suppression of lotteries are regarded by the courts to be in the interest of the morals and welfare of the people, the case of Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, gives the views of this court on the subject.

Section 600 of said City Code is not subject to the objections that it is so vague as not to set up a standard of conduct. Clearly, the standard to be applied to the prohibited acts is whether or not the possession of a ticket, writing, etc., which is the subject matter of the prosecution, " . . . is customarily or usually used in the operation of a lottery. . . . " If the ticket, paper, etc., is not customarily or usually used in the operation of a lottery, the possession thereof would not be a violation of said code section.

The Court of Appeals of Alabama in City of Birmingham v. Reed, 44 So. 2d 607 at page 613 aptly stated the proposition in the opinion of the court as follows:

> "Appellant argues that under the above ordinance the possession of a simple tablet of paper constitutes an offense. We do not agree. The papers whose possession are forbidden under this ordinance are of a kind 'customarily or usually used in the operation of a lottery,

policy game," etc. Unless common sense and common knowledge be laid aside in interpreting the above quoted standardizing and limiting phrases, vagueness does not infect the ordinance."

From the above it is clear that the Appellate Courts of Alabama have construed said Section 600 of the City Code of Birmingham of 1944 as forbidding the possession of articles of a kind which are customarily or usually used in the operation of a lottery and not the possession of articles which are customarily used in the operation of a legitimate business or activity. In other words, the Appellate Courts of Alabama have construed Section 600 of said City Code as *not prohibiting* articles such as petitioner argues to this court is prohibited by the said section.

I submit to this Honorable Court that the said City Code section is not vague and is in fact in this respect very similar to the lottery statute considered in this court in Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575. The statute considered in the Adams case, supra, established a presumption in regard to

> "the possession, by any person other than a public officer, of any . . . paper, print, writing, numbers or device, policy slip, or article of any kind such as is commonly used in carrying on, . . . the game commonly called 'policy' . . . "

This court sustained the above referred to lottery law which described the articles from which a presumption arose thereunder similar to the manner in which Section 600 of the City Code of Birmingham, Alabama describes the articles prohibited by said code.

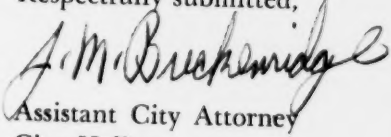
I therefore respectfully submit to this court that when Section 600 of said Code is read in the light of the decisions of the Court of Appeals and Supreme Court of Alabama construing the same, then vagueness does not infect said section.

In United States v. Brown, 68 S. Ct. 376, 333 U. S. 18, this court made the following observation:

> "Penal statutes are to be strictly construed but that maxim is not an inexorable command to override common sense and evident statutory purpose, and does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to fair import of the whole remaining language . . . nor is it required that the statute be given the narrowest meaning but is satisfied if words are given their fair meaning in accord with the manifest intent of the lawmakers."

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Court of Appeals of Alabama should be denied.

Respectfully submitted,



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APPENDIX A

SECTION 600, 1944 GENERAL CITY CODE OF THE CITY OF BIRMINGHAM, ALABAMA:

"Any person who possesses any ticket, writing, paper, slip, document, memorandum, list, article, matter or thing of any nature or kind whatsoever, which is customarily or usually used in the operation of a lottery, policy game, or game of chance of any sort or kind, or which is of a kind which is customarily used in the operation of a lottery, policy game, or other game of chance of any sort or kind, shall, upon conviction, be punished in the manner and within the limits specified by section 4. To constitute the offense created by this section it shall not be necessary that the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing be actually used, or actually be in use or is yet actually to be used in the operation of a lottery, policy game or other game of chance. It shall not be a defense to the charge of possessing the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing that it or any of them so possessed have not actually been used or were not then being used, or were not intended to be used in the operation or in connection with the operation of a lottery, policy game or other game of chance. The possession forbidden by this section shall not apply to a possession had by a police officer, sheriff, deputy sheriff or other peace officer, judge or attache of a court or an attorney, when such possession is connected with the prosecution or investigation of a violation of this section, but the burden of offering evidence that the accused's possession is under this exception shall rest upon the accused. Expert testimony shall be admissible to show that the ticket, writing, paper, slip, document, memorandum, list, article, matter or thing was customarily and usually used in the operation of a lottery, policy game, or other game of chance, and expert testimony shall also be admissible to show the contrary. (Ord. 258-F.)